UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PRIME AID PHARMACY CORP.,	)	
	)	
	)	
Plaintiff,	)	
	)	Case No.: 4:16-cv-01237-CEJ
v.	)	
	)	
EXPRESS SCRIPTS, INC.,	)	
	)	
Defendant.	)	

EXPRESS SCRIPTS' REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS

COMES NOW Defendant Express Scripts, Inc. ("Express Scripts") and hereby files its Reply Memorandum in Support of its Motion to Dismiss.

INTRODUCTION

Prime Aid's Opposition is a misleading attempt to distract the Court from the only issues before this Court: Has Prime Aid sufficiently pled a claim for fraudulent misrepresentation (Count I); violation of Missouri Prompt Pay Act (Count IV); and equitable accounting (Count VII).[1] The answer is no.

Prime Aid's failure to allege any facts regarding Express Scripts' knowledge and Prime Aid's reasonable reliance is fatal to its claim for fraudulent misrepresentation. Prime Aid has also alleged no facts establishing that Prime Aid, a New Jersey corporation, is entitled to the

[1] A prime example of the misleading nature of Prime Aid's brief is contained in footnote 5. While this footnote has absolutely no relevance to the issue before this Court and, therefore, should warrant no response, Prime Aid makes completely false statements to which Express Scripts feels obligated to respond. Contrary to Prime Aid's bold assertions, there is no 10-Q filing where Express Scripts acknowledges that it is a "target of investigations" relating to "steal[ing] patents." Prime Aid attaches no such document and it does not exist. Similarly, Prime Aid's discussion of another unrelated lawsuit that has never even been served on Express Scripts similarly lacks any relevance to this Motion to Dismiss, and is nothing more than Prime Aid's attempt to survive a motion to dismiss by slinging mud.

protections of the Missouri Prompt Pay Act ("MPPA"). Specifically, Prime Aid has not plead any facts showing that (1) Prime Aid is licensed in Missouri, and (2) that the claims at issue have ***any*** connection to Missouri.

Finally, Prime Aid's equitable accounting claim fails to allege facts demonstrating that a fiduciary relationship existed between Prime Aid and Express Scripts. This is because there are no facts to support such a conclusion—Prime Aid and Express Scripts had a classic arms-length relationship.

Accordingly, the Court should dismiss Counts I, IV, and VII of Prime Aid's Amended Complaint.

ARGUMENT

I. Prime Aid's Opposition Fails to Address the Deficiencies of the Amended Complaint's Fraudulent Misrepresentation Claim Highlighted in Express Scripts' Motion to Dismiss.

Prime Aid's Opposition fails to address the deficiencies related to its fraudulent misrepresentation claim (Count I). First, Prime Aid fails to address Express Scripts' argument that there are no specific factual allegations to support the conclusion that Express Scripts' representation was made with knowledge of the falsity. Second, Prime Aid also fails to address how its Amended Complaint alleges sufficient facts to demonstrate that its reliance was justified or reasonable.

A. Prime Aid Has Not Alleged Sufficient Facts Showing That Any Representation by Express Scripts Was Made with Knowledge of Its Falsity.

In its Opposition, Prime Aid cites multiple times to Paragraphs 60 and 64 of the Amended Complaint as evidence of its "specific detail" regarding the knowledge element. *See* Doc. 46, p. 8. Paragraph 60 of the Amended Complaint discusses (1) the timeline of the termination and subsequent letter from Ms. Hellmann, (2) the contents of the letter, and (3) a citation to the letter itself. Am. Compl. ¶ 60. Paragraph 64 discusses how (1) Prime Aid relied upon the alleged misrepresentations, (2) Prime Aid was forced to downsize its operations and the extent of the downsizing, and (3) the alleged costs of the downsizing. *Id.* ¶ 64. Yet, neither of these paragraphs addresses the very specific point made in Express Scripts' motion to dismiss, which is that Prime Aid failed to allege ***facts*** that Express Scripts ***knew*** the alleged misrepresentation was false at the time it was made.

Prime Aid spends pages in its Opposition discussing the who, what, where, when, and how elements of fraudulent misrepresentations and how its intent is "*not* to cast aspersions upon Ms. Hellman's (sic) character, or insinuate that she violated her ethical duties;" however, noticeably missing from its Opposition (and the Amended Complaint) is a single fact to establish that Express Scripts, and particularly Ms. Hellmann, had knowledge of the falsity of the statement at the time it was made. *See* Doc. 46, p. 10, n. 6.

Notably, the cases relied on by Prime Aid are not supportive. Rather, each of those cases involve complaints where the plaintiffs made detailed, specific allegations to support their conclusions that the defendants had knowledge of the falsity at the time of the alleged misrepresentation such that the complaint was sufficient to meet the heightened pleading standard under Rule 9. In *Blankenship,* the plaintiff not only alleged that the defendant had knowledge of the falsity, but that "published medical studies and articles show[] that [the defendant] had knowledge of the serious adverse effects." *Blankenship v. Medtronic, Inc.,* No. 4:13-CV-1087 CEJ, 2014 WL 3818485, at *3 (E.D. Mo. Aug. 4, 2014), reconsideration denied, No. 4:13-CV-1087 CEJ, 2014 WL 5474603 (E.D. Mo. Oct. 29, 2014).[2]

[2] In *Butano v. Wells Fargo, N.A.,* No. 4:13CV1652HEA, 2014 WL 3384733 (E.D. Mo. July 10, 2014), the plaintiff not only pled that defendant knew the alleged misrepresentations were false at the time it sent the agreement, but also the facts to support such a claim of knowledge. Similarly, in *Foam Supplies, Inc. v. The Dow Chem. Co.,* No. 4:05 CV 1772 CDP, 2006 WL 2225392 (E.D. Mo. Aug. 2, 2006), the plaintiff

In fact, Prime Aid's Amended Complaint is the very type of complaint the Court cautioned against in *Mallinckrodt*. The complaint before the Court made "common allegations . . . that defendants repeatedly represented to plaintiffs that the waste was non-hazardous, when defendants either (i) knew the waste was hazardous; or (ii) made the representations to plaintiffs in reckless disregard for their truth or falsity; and (iii) the waste was subsequently revealed to be hazardous." *Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 635 (E.D. Mo. 1996). The Court found that these conclusory allegations were insufficient because to plead that "representations were made in reckless disregard for their truth or falsity" without "**supporting facts** from which it can be inferred that defendants knew their representations were false when made" was insufficient to survive a motion to dismiss. *Id.* (emphasis added).

Because Prime Aid failed to allege supporting facts to suggest that Express Scripts knew the statement was false at the time it was made, Count I of its Amended Complaint should be dismissed.

B. Prime Aid Has Not Alleged Sufficient Facts To Demonstrate Its Reliance Was Justified or Reasonable.

Prime Aid alleges in four different paragraphs in its Amended Complaint its level of sophistication as a specialty pharmacy.[3] Less than one week after Express Scripts properly terminated Prime Aid, counsel for Prime Aid expressed that "Express Scripts has been impermissibly withholding over $8 million in funds to which Prime Aid is entitled." Am.

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not only pled that certain representations were false, but facts showing that the defendant had taken certain actions that supported the conclusion the defendant knew the representations were false.

[3] *See* Am. Compl. ¶ 7 ("Since 2006, Prime Aid has filled tens of thousands of prescriptions for Express Scripts' insureds…."); *Id.* ¶ 20 ("Prime Aid presently services over 5,000 patients filling thousands of medications annually for patients."); *Id.* ¶ 26 ("From 2006 through December 2013, Prime Aid dispensed tens of thousands of medications to thousands of Express Scripts' members."); and *Id.* ¶ 38 ("Prime Aid had filled tens of thousands of Express Scripts' prescriptions over an eight-year period.").

Compl., Exhibit F, p. 3. Prime Aid also alleges that it "believed that at least $4,000,000.00 was due and owing for medications it had dispensed to Express Scripts' insureds." Am. Compl. ¶ 62.

Yet, despite these sophisticated and specific beliefs, Prime Aid relied on a statement made by Express Scripts' attorney to Prime Aid's attorney that no additional money was being withheld. *Id.* ¶ 78. Prime Aid claims that such reliance was reasonable because the statement was made by a member in good standing of the Missouri bar. *Id.* Thus, Prime Aid's position is that it is reasonable and justifiable for Prime Aid to rely on a statement from another company's counsel, despite that Prime Aid (and its counsel) believed something entirely different. This is not reasonable reliance.

Sherwin-Williams Co., while claimed to be "inapposite" by Prime Aid, is on point. There, the plaintiff moved to dismiss a fraud claim based on the lack of reliance by the defendant, just as Express Scripts has done. *See Sherwin-Williams Co. v. Novak's Collision Ctr., Inc.*, No. 4:12CV02148 ERW, 2013 WL 5500107, at *4 (E.D. Mo. Oct. 3, 2013). The defendant claimed that it was reasonable for it to rely on a promise based on the parties' "lengthy business relationship" and because the relationship was based on trust and confidence. *Id.* The Court disagreed, finding that plaintiff failed to allege sufficient facts to demonstrate that the relationship was one of trust or confidence "that would eliminate the need to conduct an independent investigation." *Id.*

Similarly, Prime Aid has failed to allege facts that support its claim that it was reasonable to rely on a statement made from counsel to counsel such that no independent investigation was necessary to determine if it was actually missing between $4,000,000.00 and $8,000,000.00. This failure is fatal to Prime Aid's claim for fraudulent misrepresentation. Accordingly, Count I should be dismissed.

II. Prime Aid's Claim for Violation of the MPPA (Count IV) Should Be Dismissed.

Prime Aid is a New Jersey corporation with its principal place of business in New Jersey and is seeking damages relating to the reimbursement of non-Missouri claims pursuant to a Missouri statute. Specifically, Prime Aid's position is that it is a "claimant" under the MPPA and thus entitled to the protections of the statute, despite having absolutely no connection to the State of Missouri.

Courts applying Missouri law have consistently held that when assessing the language of a statute, "courts are to look at the whole act and its purposes and avoid unreasonable, unjust, or absurd results." *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 742 (8th Cir. 2009) (citing *State ex rel. Killingsworth v. George*, 168 S.W.3d 621, 623 (Mo. Ct. App. 2005)). Here, under Prime Aid's interpretation of the MPPA, this statute could be applied to ***any*** corporation asserting a right to payment, regardless of where the corporation is located and regardless of whether the claims at issue have any connection to Missouri (*i.e.*, claims related to Missouri health plans and/or Missouri residents). This indeed would be an absurd result.

Prime Aid alleges no facts – conclusory or otherwise – that it is a "healthcare provider" entitled to the provisions of the MPPA. Notably, for the first time in its Opposition, Prime Aid claims that it is licensed in Missouri and, therefore, is subject to MPPA. However, this fact does not appear anywhere in the Amended Complaint. While Prime Aid claims that it is "licensed in approximately forty (40) states," it makes no mention of any purported license in Missouri. Am. Compl. ¶ 62. Similarly, Prime Aid has not alleged any facts showing that a single one of the 104 claims at issue have any connection with the State of Missouri. *See id*. ¶ 104.

As set forth in the Motion to Dismiss, cases applying the MPPA have consistently applied this statute to Missouri health care professionals claiming reimbursement for Missouri claims. *See* Doc. 45, p. 7. Prime Aid has not distinguished a single one of these cases. Its failure to do so is telling. The MPPA does not apply to this case and Count IV must be dismissed.

III. Prime Aid's Equitable Accounting Claim (Count VII) Fails Because Prime Aid Fails to Allege as a Matter of Law That a Fiduciary Relationship Exists.

To state a claim for equitable accounting, Prime Aid must show: (1) a need for discovery of the information relevant to the property; (2) that the accounts are complicated; (3) that a fiduciary relationship exists; and (4) that plaintiff does not have an adequate remedy at law. *In re Vantage Investments, Inc*., 385 B.R. 670, 706 (Bankr. W.D. Mo. 2008).[4]

Prime Aid claims a fiduciary relationship exists because "Express Scripts controlled Prime Aid's money and business." Doc. 46, p. 13; Am. Compl. ¶¶ 135-36. Prime Aid's cases to support this theory are inapposite and deal with relationships beyond those created by an arms-length contract. *See e.g., A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386 (Mo. Ct. App. 1998) (finding that a fiduciary relationship existed because plaintiff was an agent of defendant); *SSM Health Care Corp. v. Repwest Ins. Co.*, No. 4:14CV1552 CDP, 2014 WL 5800214 (E.D. Mo. Nov. 7, 2014) (finding that plaintiff pled a fiduciary duty claim against defendant insurer when plaintiff settled underlying claim after defendant insurer, who was involved in settlement negotiations, consented to the settlement, but later refused to pay); *McDonnell Douglas Corp. v. SCI Tech.*, Inc., 933 F. Supp. 822 (E.D. Mo. 1996) (holding that plaintiff pled fiduciary duty claim when plaintiff made an investment based on representations made by defendant).

[4] Plaintiff cites *Bunzl Distribution USA, Inc. v. Schultz,* No. 4:05CV605 JCH, 2006 WL 36*3 (E.D. Mo. Dec. 13, 2006) for its proposition that these elements are only "generally necessary." Yet, *Bunzel* cites directly to *Chmieleski*, which held (in accordance with Missouri law) that such elements are, in fact, mandatory. *Chmieleski v. City Products Corp.,* 660 S.W.2d 275, 294 (Mo. Ct. App. 1983).

Here, there is no broker or investor type relationship at issue, nor is there an insurer/insured relationship. Rather, it is a relationship where Prime Aid, a healthcare provider, submits claims for reimbursement to Express Scripts, a pharmacy benefits manager, pursuant to a contract. Nothing more. There is simply no support (and Prime Aid has cited none) to find that a fiduciary relationship exists in this context. If Prime Aid's theory was valid, every insurer or third party payor would be a fiduciary to healthcare providers that submitted claims for reimbursement. This indeed would be an absurd result and one not supported by Missouri law.

Prime Aid has not alleged (and cannot allege) any facts to establish that the relationship between Express Scripts and Prime Aid is anything more than a business contractual relationship. Accordingly, Count VII should be dismissed. *See Graham Construction Services, Inc. v. Hammer & Steel, Inc.*, 2012 WL 685459, *5 (E.D. Mo., March 2, 2012) (granting defendant's motion to dismiss because while the plaintiff may have relied on defendant's statements, the plaintiff was a "sophisticated client, and there is no evidence its dealings with [defendant] were other than entirely arms-length).

CONCLUSION

For these reasons, Express Scripts respectfully requests that the Court dismiss Counts I, IV, and VII of the First Amended Complaint pursuant to Rule 12(b)(6).

Date: November 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of November, 2016 a copy of the foregoing document was filed with the Clerk of the Court to be served upon counsel of record via the Court's ECF system.

/s/ Sarah C. Hellmann